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In The
Supreme Court of the United States

HOWARD MICHAEL WAMPLER,
LARRY C. SHAVER, and LEWIS PATRICK COLBERT,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioners are co-defendants in an indictment. The indictment grew out of a government-breached plea agreement which granted Petitioners an agreement of non-prosecution. The government's breach resulted in the dismissal of a corporate defendant's appeal of the rejection of the plea agreement, over the Petitioners' objections and the ultimate indictment of the Petitioners contrary to their written agreement for non-prosecution.

The Petitioners filed a joint motion to enforce the agreement for non-prosecution and to dismiss the indictment based on double jeopardy/collateral estoppel grounds which was denied. The Petitioners sought an appeal pursuant to 28 U.S.C. § 1291, under the doctrine of *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949) and *Abney v. United States*, 431 U.S. 651 (1977) as the decision of the District Court was a final decision under the so-called "collateral order" exception because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration of the principal issue in the indictment. On appeal the United States Court of Appeals for the Tenth Circuit affirmed the decision of the district court.

The Fifth Amendment Double Jeopardy Clause of the United States Constitution provides "nor shall

QUESTION PRESENTED – Continued

any person be subject for the same offence to be twice put in jeopardy for life or limb; . . . nor be deprived of life, liberty, or property, without due process of law." This Court recognized in *Ashe v. Swenson*, 397 U.S. 436 (1970) that collateral estoppel is a component of the double jeopardy clause. In spite of the double jeopardy component the government continues to place the Petitioners in jeopardy, even though each relied to their detriment and performed their obligations to obtain agreements for non-prosecution.

Should the government be barred by double jeopardy and collateral estoppel from proceeding against the Petitioners due to the government's bad faith breach of a plea agreement which provided for non-prosecution of the Petitioners after the Petitioners' detrimental reliance and performance of their obligations thereunder?

PARTIES

The caption of the case accurately reflects all parties to the proceedings before this Court.

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OPINIONS AND ORDERS BELOW

(1) The opinion of the United States Court of Appeals for the Tenth Circuit affirming the district court is published and available at *United States v. Wampler, Shaver and Colbert,* 624 F.3d 1330 (10th Cir. 2010) and available in the record at App. 1. (2) The district court's order denying Petitioner's "Motion to Dismiss Indictment" is unpublished but available in the record at App. 26. (3) The order denying the petition for rehearing and suggestion for en banc review was denied on December 23, 2010, and is available in the record at App. 41.

JURISDICTIONAL STATEMENT

Pursuant to Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals. The provisions of Supreme Court Rules 29.4(b) and (c) are inapposite in this case. The United States is a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioners, Lewis Patrick Colbert, Larry C. Shaver and Howard Michael Wampler, were indicted in the Western District of Oklahoma on May 20, 2009. Said Indictment followed a previous appeal by a corporate defendant to the United States Court of Appeals for the Tenth Circuit and a significant history at the district court level.

Some years prior to the Indictment, the Government had identified five criminal "targets" of an investigation (three of which are the Petitioners

herein). Collectively, the "targets" through individual counsel, along with the corporate defendant's counsel entered into negotiations with the United States with the goal to reach a resolution to the multi-agency, multi-million dollar federal investigation into use of low income housing tax credits. In October 2007, the parties reached such an agreement with the government whereby the corporate defendant "McSha" owned by the "targets" would plead guilty to wire fraud and money laundering in connection with the disputed tax credits, and the five individuals would each receive non-prosecution agreements. Under this agreement, the Government was to receive a large initial cash payment, with an additional amount to be paid over the following eighteen (18) months. Each of the five targeted individuals would and did contribute funds toward this Package Deal Plea Agreement.

The Petitioners (three of the original five targets), prior to acceptance of the Package Deal Plea Agreement by the Court, were each required to perform certain acts pursuant to the written Plea Agreement. The government required Petitioner Lewis Patrick Colbert to relinquish his license as a certified public accountant as part of any negotiated Package Deal Plea Agreement. As part of the agreement the government demanded the monetary payments from the individuals be secured by a "protective provision" allowing the Government to collect additional amounts from the individuals, if the corporate defendant, McSha, failed to pay the full amount by the end of

the eighteen (18) month term. In order to satisfy the Government's request under the agreement, the individuals would have to execute a written agreement among themselves, outlining their respective obligations under the Package Deal Plea Agreement.

Additionally, Petitioner Larry C. Shaver, to make the global settlement "work," was required to give up his exclusive control of the voting stock of the corporate defendant, McSha. The release of control of the voting stock was known to the government and done by Petitioner Shaver in reliance upon the Plea Agreement. Petitioner, Howard Michael Wampler was required to resign as an officer and director of the corporate defendant, McSha. Collectively, the Petitioners would not have taken said action without the request for performance by the government and in reliance upon the non-prosecution agreement. These known and reasonable acts were taken prior to presentation of the Plea Agreement to the district court.

Thereafter, the government and separate counsel for the corporate defendant, McSha, presented the executed Package Deal Plea Agreement to the district court. At the plea hearing, the district court conducted the inquiry required by Rule 11, Federal Rules of Criminal Procedure. To everyone's surprise, the court rejected the Plea Agreement "because it included grants of immunity from prosecution to the individuals."

The district court specifically explained that he was rejecting the Plea Agreement "because the essence of the agreement is that the five named individuals in

it will not be prosecuted personally," and because it "lets these individuals avoid completely the risk of criminal exposure."

After Motions to Reconsider were denied by the district court, and over the objections of the Petitioners, the corporate defendant, McSha, withdrew its guilty plea, and the district court dismissed the Information against McSha. McSha then appealed the dismissal of the Information to the United States Court of Appeals for the Tenth Circuit, arguing, among other things, that the rejection of the Package Deal Plea Agreement for the stated reason that others should be prosecuted constituted a violation of the Constitutional separation of powers doctrine. *United States v. McSha Properties, Inc.*, No. 08-6106. The five individuals joined in the appeal as amicus curiae, arguing that they were the real parties in interest, because they were at risk of prosecution as a result
of the court's violation of the separation of powers doctrine.

While the *McSha* appeal was pending, the government entered into covert negotiations with counsel for two of the originally targeted five individuals, Mr. Steven Jones and Mr. Michael McClure, without the knowledge or participation of Petitioners, Wampler, Shaver, or Colbert or their respective counsel. During these covert negotiations, the government offered Mr. Jones and Mr. McClure immunity from prosecution, conditioned upon their agreement to cause the corporate defendant, McSha, to dismiss its appeal.

The government was aware that Petitioner Shaver had relinquished his voting proxies over the (McSha) stock held by Jones and McClure as a direct result of the Package Deal Plea Agreement and the acts required to be performed prior to the entry of the plea by McSha and acceptance of the Plea Agreement. Consequently, Jones and McClure now controlled two thirds of the corporate defendant, McSha's voting shares, and thus controlled the company, McSha. (But for the Plea Agreement the government could not have negotiated the deal with Jones and McClure to dismiss the McSha appeal.) Claiming to exercise their newly acquired voting powers, and as a result of the Government's renewed offer of immunity, Jones and McClure caused McSha to file a motion to dismiss McSha's appeal. Petitioners Shaver, Colbert and Wampler objected to the dismissal of the appeal, but their objections were overruled and the McSha appeal was dismissed, leaving Shaver, Colbert and Wampler without a forum for review of their Constitutional claims and with their non-prosecution agreements with the government in question.

On May 20, 2009, in the United States District Court for the Western District of Oklahoma, the government, with the assistance of their two new cooperating witnesses, sought and received an Indictment against the Petitioners (Shaver, Colbert and Wampler) in violation of the Package Deal Plea Agreement and the written promise of non-prosecution.

On September 1, 2009, the Petitioners moved the district court to dismiss the Indictment against the

Petitioners, arguing that the Indictment resulted from a violation of the separation of powers between the Judicial and Executive branches, that the Indictment violated the terms of the Government's express written agreement not to prosecute these Petitioners, and that the Indictment violated basic due process principles and double jeopardy. On October 15, 2009, the district court denied the motion without a hearing. The Petitioners each filed notices of appeal on October 26, 2009.

The United States Court of Appeals for the Tenth Circuit consolidated the cases for appeal and on November 16, 2010, a three-judge panel of the Tenth Circuit announced its decision affirming the district court's denial of Appellant's Motion to Dismiss. The Petition for Rehearing En Banc was subsequently denied on December 23, 2010.

ARGUMENT

THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBITS PUTTING ANY PERSON IN JEOPARDY TWICE FOR THE SAME OFFENSE. THE GOVERNMENT HAS ATTEMPTED TO PUT PETITIONERS IN JEOPARDY A SECOND TIME AFTER THE GOVERNMENT BREACHED A PLEA AGREEMENT PROVIDING FOR NON-PROSECUTION OF THE PETITIONERS. IS THE GOVERNMENT BARRED BY DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL FROM PROCEEDING AGAINST THE PETITIONERS DUE TO THEIR BAD FAITH BREACH OF A PLEA AGREEMENT WHICH PROVIDED FOR NON-PROSECUTION OF THE PETITIONERS AFTER THE PETITIONERS' DETRIMENTAL RELIANCE AND PERFORMANCE OF THEIR OBLIGATIONS THEREUNDER?

Collateral estoppel, a component of double jeopardy, stands for the proposition that "when an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, at 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *United States v. Wittig*, 575 F.3d 1085, at 1098 (10th Cir. 2009). In *Ashe*, this Court reiterated its holding in *United States v. Oppenheimer*, 242 U.S. 85, 61 L.Ed. 161 (1916), that the doctrine is applicable to criminal law and not just civil suits. Moreover, this Court in *Ashe*, determined that "the rule of collateral estoppel in criminal cases is not to

be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." 397 U.S. at 444.

In *Ashe* the defendant was prosecuted for the robbery of six individuals. Instead of charging the Defendant with six counts of robbery, the government charged him with one count of robbery and "treated the first trial as no more than a dry run for the second prosecution." *Id.* at 447. This Court held that the Constitution forbids a prosecutor from refining his presentation in light of the prior events and using a previous charge as a practice run. *Id.* Therefore, once a final judgment has been reached, the prosecutor cannot re-indict the defendant for the same conduct.

This Court recently refined its various decisions regarding the application of collateral estoppel to criminal proceedings by holding that in order to determine what has already been decided, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Yeager v. United States*, ___ U.S. ___, 129 S.Ct. 2360, at 2367, 174 L.Ed.2d 78 (2009) (*citing Ashe*, 397 U.S. at 444). Furthermore, "the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Yeager* (*quoting Sealfon v. United States*,

332 U.S. 575, at 579 (1916)). Accordingly, the Court should determine exactly what was litigated in the final judgment and how those determinations bear on the current proceedings.

A. THE BREACHED, CONTRACTUAL PACKAGE DEAL PLEA AGREEMENT AMOUNTS TO A FINAL JUDGMENT.

The application of collateral estoppel must be based on a valid judgment. Here, the binding, contractual and fulfilled Plea Agreement must be treated as a final judgment. In *United States v. Gallardo-Mendez*, 150 F.3d 1240 (10th Cir. 1998), the Tenth Circuit noted the rationale in *Ashe*, where this Court determined that the doctrine was not "available to criminal defendants as a matter of judicial efficiency; the Court found a constitutional mandate for use of the doctrine by the defendant in the Fifth Amendment guarantee against double jeopardy." Furthermore, the Tenth Circuit adopted the Third Circuit's determination "that 'the liberty interest of a criminal defendant takes priority over the usual concerns for efficient judicial administration so often found in civil proceedings.'" 150 F.3d at 1244 (*citing Ashe, supra,* and *United States v. Pellulo*, 14 F.3d 881, at 893 (3rd Cir. 1994)).

In the case at bar, the corporate defendant, McSha, pled guilty to wire fraud and money fraud on January 15, 2008, but the real parties in interest to

the plea were the five principals (including three Petitioners, herein) who detrimentally relied on the Plea Agreement prior to the plea being presented to the court. In essence, because of the nature of the punishment, the five principals pled guilty, through the corporation, to the charges in the indictment. The corporation would not be subjected to punishment, because the individuals were punished, admitting guilt to the acts alleged, and the plea was to act as a final conviction. Accordingly, the Petitioners should be afforded the protection they deserve because it is their liberty interests that are at stake.

The Petitioners were not attempting to withdraw the guilty plea, nor are they contesting the voluntariness or their understanding of the Plea Agreement. Instead, the corporation, and its five principals, pled guilty to the charges, after not only being fully appraised of the consequences, but after subjecting themselves to punishment prior to the Court being presented with the Package Deal Plea Agreement. However, instead of considering the entirety of the Plea Agreement, the district court, in violation of the separation of powers doctrine, refused to accept the Plea Agreement and these three Petitioners were later indicted.

Since the district court should have accepted the Package Deal Plea Agreement and deferred to the Government's decision not to prosecute the Petitioners in their personal capacities, and since the new indictment implicates the Petitioners' Fifth Amendment protection from double jeopardy, the binding

and fulfilled Plea Agreement should be treated as a final judgment.

B. THE CHARGES PLED TO BY MCSHA IN THE FINAL, BINDING PLEA AGREEMENT PRECLUDES THE GOVERNMENT FROM INDICTING THE PETITIONERS.

To determine whether collateral estoppel applies to determinations made in previous proceedings, a court must look at the record, including the pleadings, evidence and charge, to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, ___ U.S. ___, 129 S.Ct. 2360, at 2367, 174 L.Ed.2d 78 (2009). Furthermore, as this Court in *Yeager* elaborated, "the inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.*

The substance of *Yeager* is not directly controlling, as this Court considered whether a jury hanging on certain counts of an indictment should be considered in determining whether those charges may be precluded from re-indictment. *Id.* at 2367-68. However, the reasoning relied upon by this Court in *Yeager* is applicable, because viewed in a "practical frame and . . . with an eye to all the circumstances of the proceedings," the judgment that should have been reached by the district court precludes the indictment of Petitioners Colbert, Shaver and Wampler.

The record reveals that the Government chose to charge the corporate defendant, McSha Properties, in lieu of its principals. The guilty plea entered by the corporate defendant, McSha, should have provided a final adjudication to the actions in controversy performed by the corporation, through the five principles. The subsequent indictment of the individuals was simply the prosecutor's attempt to pile on charges that he had in writing agreed not to bring against the Petitioners in exchange for their performance and detrimental reliance under the Package Deal Plea Agreement. Therefore, the entered guilty plea, that the district court should have accepted, should collaterally estop the government from forcing the individuals to run the gauntlet again, and face a second punishment.

C. THE GOVERNMENT'S BREACH OF ITS OBLIGATIONS UNDER THE PLEA AGREEMENT AMOUNTED TO DOUBLE JEOPARDY.

The Petitioners have a right not to be tried under an indictment brought in direct breach of the Government's promise not to prosecute them. *Accord, United States v. Alessi,* 536 F.2d 978 (2nd Cir. 1976); *United States v. Villa-Vasquez,* 536 F.3d 1189, at 1199 (2008); *United States v. Novosel,* 481 F.3d 1288 (10th Cir. 2007). The Government's promise not to prosecute the Petitioners was an essential part of the Package Deal Plea Agreement with the corporate defendant, McSha Properties, Inc., without which McSha would not have entered into the Plea Agreement. The

Package Deal Plea Agreement became binding against the Government when the Petitioners each took reasonable and known action to perform under the Agreement prior to the attempted plea by McSha.

The Package Deal Plea Agreement must be enforced for three reasons. First, this Court in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) recognized a defendant's due process right to enforce an agreement with the prosecution if the defendant has honored the terms of that agreement. Second, courts can look to general contract law to enforce the terms of plea agreements. Generally, plea agreements are to be construed as contractual in nature, and contract principles should be applied in interpreting them, *United States v. DeWitt*, 366 F.3d 667, at 669 (8th Cir. 2004). Third, under Rule 11 of the Federal Rules of Criminal Procedure, a defendant can assert the Government's obligation to fulfill its promises under a plea agreement.

A defendant waives numerous constitutional rights when he enters into a plea agreement with the Government. *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006). As part of this bargain, the Government must honor its promises to the defendant. Where, as here, the Government abandons its promise, a correction is required to "preserv[e] the integrity of the criminal justice process, and the public's faith in this integrity." *United States v. VanDam*, 493 F.3d 1194, at 1204 (10th Cir. 2007). Plea bargaining is an essential component of the administration of justice, and when properly administered, is to be encouraged. *Santobello,*

supra. A plea agreement is not simply a contract between two parties, the breach of which can be compensated by monetary damages. A plea agreement necessarily implicates the very integrity of the criminal justice system. *Villa-Vasquez, supra.* The Government has a heightened responsibility to honor its obligations under a plea agreement, because the validity of plea agreements "presuppose[s] fairness in securing agreement between an accused and a prosecutor." When a plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello,* 404 U.S. at 261. Allowing the Government to breach a promise that induced performance violates due process. *Id.*; *United States v. Van Thournout,* 100 F.3d 590, at 594 (8th Cir. 1996). Further, "with respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights – to concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government." *United States v. Jensen*, 423 F.3d 851, at 854 (8th Cir. 2005) (*internal citation omitted*).

General principles of contract law define the Government's obligations under a plea agreement, looking to the express language of the agreement, and construing any ambiguities against the Government. *United States v. Calabrese,* 645 F.2d 1379 (10th Cir.

1981), *cert. denied,* 101 S.Ct. 3008 (1981); *Villa-Vasquez, supra; United States v. Guzman,* 318 F.3d 1191, at 1195-96 (10th Cir. 2003); *United States v. E.V.*, 500 F.3d 747, 751 (8th Cir. 2007); *accord, United States v. Sanchez*, 508 F.3d 456, at 460 (8th Cir. 2007) ("Due process may be violated if there is a breach of a promise that induced a guilty plea.")

Each of the Petitioners in this case took substantial, detrimental actions in reliance upon the Government's promise not to prosecute them. The actions taken were reasonable and known to the Government. Petitioner Colbert forfeited his accounting license and resigned his position with a successful accounting practice. As part of the plea negotiations, the government specifically demanded that Petitioner Colbert relinquish his C.P.A. license, which Mr. Colbert did prior to executing the written Plea Agreement. Petitioner Colbert acted in good faith reliance upon the Government's promise not to prosecute him, if he complied with the terms of the Plea Agreement.

Additionally, Petitioner Shaver gave up control of the thriving business he had founded over 20 years earlier, forfeiting his position as C.E.O. of the corporate defendant, McSha, and relinquished his voting proxies. Finally, Petitioner Wampler relinquished his job and his position as an officer with the corporate defendant, McSha. All Petitioners acted in reliance upon the government's promise not to prosecute, and said actions were reasonable, were anticipated, known and expected by the government. In essence, each of the Petitioners forfeited his career, his livelihood, and

his future business prospects in exchange for the government's promise not to prosecute them. In return for their trust and reliance, the government indicted Petitioners. In this instance, the breach of the Plea Agreement amounted to double jeopardy through an extension of the principles of collateral estoppel.

In keeping with established principles of contract law, the Petitioners' substantial, detrimental reliance makes the Package Deal Plea Agreement enforceable against the Government. *See United States v. Smith*, 978 F.2d 1268 (10th Cir. 1993); *United States v. Savage*, 978 F.2d 1136 (9th Cir. 1992); *United States v. Puckett*, ___ U.S. ___, 129 S.Ct. 1423, at 1430, 173 L.Ed.2d 266 (2009); *Santobello, supra; United States v. Cachucha*, 484 F.3d 1266 (10th Cir. 2007); and *United States v. Cudjoe*, 534 F.3d 1349 (10th Cir. 2008).

Knowing that Petitioner Shaver, in compliance with the Package Deal Plea Agreement had relinquished his voting proxies, the Government induced Jones and McClure to use their new voting rights to dismiss the corporate defendant, McSha's appeal. Taking into consideration all circumstances of the proceedings involved with these Petitioners, *Yeager v. United States*, ___ U.S. ___, 129 S.Ct. 2360, 174 L.Ed.2d 78 (2009), the government should be barred from proceeding with the prosecution of the indictment based on double jeopardy.

As for the consideration of all of the circumstances, the Petitioners each provided substantial consideration, including money, their jobs, professional licenses and stakes in the company while, the government promised not to prosecute them at any point in the future.

A system that would allow the parties to enter into good faith plea negotiations, sign a written agreement, stop trial preparations, continue a trial date, and then face the prospect that the Government could withdraw from the agreement on a whim led Chief Justice Burger to speak of the "unfortunate lapse in orderly prosecutorial procedures" when the state fails to keep its commitments under a plea agreement. *Santobello*, 404 U.S. at 260, 92 S.Ct. 495. Chief Justice Burger went on to outline the benefits of plea negotiations to the criminal justice system. *Id.* If the defendant is found to waive his rights at the moment of signing, the same must be true of the Government for the contract to make sense and for plea bargaining to be a reliable system for administering justice. Federal courts are not loathe to order performance of plea bargain agreements by the Government, *e.g., Correale v. United States*, 479 F.2d 944 (1st Cir. 1973), even if this compels dismissal of an indictment, *e.g., United States v. Lieber*, 473 F. Supp. 884 (E.D.N.Y.1979); *United States v. Phillips Petroleum Co.*, 435 F. Supp. 622 (N.D. Okla.1977); and *United States v. Minnesota Mining & Manufacturing Co.*, 428 F. Supp. 707 (D. Minn.1976). "The most meticulous standards of promise and performance must

be met by prosecutors engaged in negotiating such agreements." *Phillips Petroleum*, 435 F. Supp. at 640, *citing Correale, supra*.

Each of the Petitioners acted in good faith reliance upon the Government's sworn promise not to prosecute them individually. Each of them has sustained tremendous personal and business losses as a result of, and in reliance upon, the Government's promise not to prosecute them.

In the interests of justice, and in keeping with the principles of fundamental fairness which are the hallmark of due process, the Government's promise not to prosecute must be enforced based on collateral estoppel as a component of the Double Jeopardy Clause of the Fifth Amendment that an issue of ultimate fact has been determined by a valid and final judgment between the parties.

CONCLUSION

For the foregoing reasons, Petitioners, Lewis Patrick Colbert, Larry C. Shaver and Howard Michael Wampler respectfully requests a Writ of Certiorari issue to review the Opinion entered November 16, 2010, of the United States Court of

Appeals for the Tenth Circuit in Case Numbers 09-6229, 09-6230 and 09-6231.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOWARD MICHAEL WAMPLER, Defendant-Appellant.	No. 09-6229

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LARRY C. SHAVER, Defendant-Appellant.	No. 09-6230

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEWIS PATRICK COLBERT, Defendant-Appellant.	No. 09-6231

Appeal from the United States District Court for the Western District of Oklahoma (No. 5:09-CR-00168-C-3; No. 5:09-CR-00168-C-1; No. 5:09-CR-00168-C-2)

(Filed Nov. 16, 2010)

John W. Coyle, III, Coyle Law Firm, Oklahoma City, Oklahoma, and Mack K. Martin, Martin Law Office, Oklahoma City, Oklahoma (J. David Ogle, Ogle Law Office, P.L.L.C., Oklahoma City, Oklahoma, with them on the briefs), for Defendants-Appellants.

Scott E. Williams, Assistant United States Attorney (Sanford C. Coats, United States Attorney, with him on the brief), Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **GORSUCH** and **EBEL,** Circuit Judges, and **ARGUELLO***, District Court Judge.

GORSUCH, Circuit Judge.

The defendants argue that an unconsummated plea agreement between their former corporate employer and the government bars their current

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* The Honorable Christine M. Arguello, United States District Court Judge, District of Colorado, sitting by designation.

prosecution and upcoming trial. Despite this, the district court held the defendants must stand trial. So unless we hear their appeal now, the defendants worry, their "right not to be tried" under the terms of the plea agreement will be lost forever. But whatever else the plea agreement may do, one thing it doesn't do is confer jurisdiction on this court to entertain an interlocutory appeal. Generally, a defendant must await a final judgment in the district court before pursuing an appeal. To overcome this rule and secure interlocutory review of a collateral order based on a claimed "right not to be tried," some constitutional or statutory provision must grant him or her that right. Where, as here, no such provision is in play, we must, as usual, defer review of the defendants' arguments until after their trial, should it happen to result in a final judgment of conviction.

I

The genesis of this case lies in another, earlier proceeding and some sense of that first proceeding is helpful to understand the one now before us.

It all began when the government targeted McSha Properties, Inc. and certain of its employees in a criminal investigation. According to the government, the company; its founder, Larry Shaver; and four other principals, Michael Wampler, Lewis Colbert, Michael McClure, and Steven Jones, used falsified construction invoices to inflate the costs of the company's low-income housing projects. On the

basis of these false invoices, the government alleged, the company secured loans from financial institutions and tax credits from the federal government far in excess of what its projects merited – all while the individuals pocketed a small fortune.

As the investigation progressed, the two sides began plea negotiations. In the hope of inducing the government to focus its attention on the company rather than on them, Mr. Shaver voluntarily relinquished his controlling voting proxies in the company and agreed to resign as Chairman and CEO; Mr. Colbert asked to have his CPA license placed in retirement status; and Mr. Wampler resigned as an officer and director of the company. All these efforts seemed to pay off. The negotiations culminated in a proposed plea agreement, pursuant to which McSha agreed to plead guilty to a two-count information charging it with wire fraud and money laundering; in return, the government agreed not to prosecute any of the individuals who ran McSha.

The agreement, however, soon derailed. When the company petitioned the district court to enter a plea of guilty, the court questioned whether the plea agreement unjustly let the company's principals off the hook. Ultimately, the court announced pursuant to Fed. R. Crim. P. 11(c)(3)(A) that it would not approve the agreement for that reason. McSha then withdrew its plea and the district court entered an order dismissing the matter without prejudice.

At first, the company sought to appeal the district court's decision refusing to accept its plea agreement, but it later withdrew the appeal. And behind that lies another small story. By this time, Mr. Shaver had relinquished control of the company, so Mr. Jones and Mr. McClure controlled its operations. When the government offered that pair immunity from future prosecution if they caused McSha to dismiss the appeal, they readily agreed.

And that brings us now to the case before us. This case began when, after the appeal's dismissal and taking up the district court's suggestion, the government filed an indictment against Messrs. Shaver, Wampler, and Colbert charging them with various crimes. To the indictment, the defendants replied with a motion to dismiss. In their motion, the defendants raised three arguments, all focused on the implications of the earlier, failed plea deal. First, the defendants argued, the terms of the failed plea agreement between McSha and the government barred their indictment; the old plea agreement, they reminded the district court, included a promise that they would not be prosecuted. Second, the defendants contended that the district court effectively and improperly coerced the government into filing the indictment against them, implicating separation of powers concerns. Third and finally, the defendants said, the indictment was motivated, at least in part, by a desire to retaliate against them for allowing the company to appeal the district court's rejection of the plea agreement – that is, before Mr. Jones and

Mr. McClure were induced to withdraw the appeal. The government's desire to retaliate against them, the defendants submitted, improperly trenched upon their First Amendment rights. Finding none of these arguments persuasive, the district court denied the defendants' motion to dismiss and it is this ruling the defendants now wish to appeal.

II

The first question we must ask in this and any appeal is whether we have jurisdiction to entertain it. The question is especially pressing where, as here, everyone in the case admits that the only thing being appealed is a non-final or interlocutory order denying a motion to dismiss. Under 28 U.S.C. § 1291, Congress has afforded the courts of appeals jurisdiction over "final decisions of the district courts." Usually, this means litigants must await a final judgment terminating their case before pursuing an appeal. *Mohawk Indus. v. Carpenter*, 130 S. Ct. 599, 605 (2009). So it would appear that the defendants' arguments in their motion to dismiss should be taken up only after their trial and only if it happens to result in a final judgment of conviction. If the district court erred in denying the motion to dismiss, we can say so and undo any conviction then.

Of course, the defendants do not want to wait until after trial. They want their appeal heard now. And, they note, in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court long

ago held that, as a "practical" matter, some interlocutory orders can qualify as "final decisions" within the meaning of § 1291 because, while they don't conclusively resolve the litigation, they do conclusively resolve important questions separate from the merits. *Id.* at 546-47. In our case, the defendants claim that all three of their arguments may be pursued now, before trial, under *Cohen*'s terms. This is because, they explain, each of their arguments is collateral to the question of their guilt or innocence on the charges against them and each involves a "right not to be tried" granted by the plea agreement – a right that will be lost if review is deferred until after a final judgment.

To evaluate the defendants' assertion and our jurisdiction to entertain this appeal, we first outline *Cohen*'s application in the criminal context to claims asserting a "right not to be tried," before then turning to assess how the three arguments the defendants wish to pursue measure up against this legal standard.

A

To qualify as a "practically" final decision amenable to interlocutory appeal under *Cohen*, the district court's order in question must (1) finally decide (2) an important question collateral to (or separate from) the merits of the underlying proceeding, and (3) be "effectively unreviewable" after final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S.

863, 867 (1994). In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this "stringent" test should be understood as "small," "modest," and "narrow." *See id.* at 868 ("stringent"); *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 42 (1995) ("small"); *Will v. Hallock,* 546 U.S. 345, 350 (2006) ("modest"); *Mohawk,* 130 S. Ct. at 609 ("narrow"). The Court has come to tell us, as well, that the *Cohen* test should be applied with special – in fact, "the utmost" "strictness" in criminal cases "[b]ecause of the compelling interest in prompt trials." *Flanagan v. United States,* 465 U.S. 259, 265 (1984); *see also Abney v. United States,* 431 U.S. 651, 657 (1977) ("[T]he delays and disruptions attendant upon intermediate appeal . . . are especially inimical to the effective and fair administration of the criminal law." (internal quotation omitted)). And, the Court has recently "stressed" and "admoni[shed]" that *Cohen* must "never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digital,* 511 U.S. at 868; *Mohawk,* 130 S. Ct. at 605.[1]

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[1] Some members of the Court have in the last few years suggested going further still, questioning whether *Cohen* remains consistent with § 1291 in light of contemporary amendments to the Rules Enabling Act. *See Mohawk,* 130 S. Ct. at 610-12 (Thomas, J., concurring in part and concurring in the judgment); *see also Sell v. United States,* 539 U.S. 166, 190-93 (2003) (Scalia, J., dissenting).

No doubt, all these cautionary directions are inspired by the High Court's respect for the plain language of § 1291 – which restricts appellate review to "final decisions" – and for the congressional policy which the statute seeks to advance – namely that it is the *district judge,* not the appellate judge, who in our system of justice has "primary responsibility to police the prejudgment tactics of the litigants, and . . . the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 436 (1985). As the Supreme Court has explained, "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation" under our judicial system, as reflected in § 1291. *Mohawk,* 130 S. Ct. at 605 (internal quotation marks omitted). Toward that same end, the Court has told us that *every* issue presented in an interlocutory appeal must "fall within *Cohen*'s collateral-order exception" before we may review its merits; the courts of appeals possess no "pendent" jurisdiction permitting them to decide collateral issues that fail to meet *Cohen*'s test. *Abney*, 431 U.S. at 663; *United States v. Wittig*, 575 F.3d 1085, 1095 (10th Cir. 2009).

When it comes to the second and third aspects of *Cohen*'s test – requiring the collateral question to be both "important" and "effectively unreviewable" after a final judgment – a key distinction must be

recognized in the criminal context. Any criminal trial carries with it many and grave tribulations for the defendant that no vindication after trial can erase. *See United States v. MacDonald,* 435 U.S. 850, 860 n.7 (1978). In one and very real sense, any district court decision refusing to enforce a legal entitlement capable of commanding the dismissal of criminal charges before trial is both "important" and "effectively unreviewable" after final judgment. For example, if the district court forces a defendant to go to trial after erroneously rejecting his motion to dismiss predicated on a Sixth Amendment speedy trial violation or a Fourth Amendment suppression argument, an important "right not to be tried" guaranteed by those provisions might well be said to be effectively lost.

But this isn't enough to warrant interlocutory appellate review. In both circumstances – in the Sixth Amendment speedy trial arena and the Fourth Amendment context – it is well and long settled that district court decisions may be reviewed only *after* trial. *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801 (1989). As the Supreme Court has put it, the fact that a district court may have erred in denying a defendant the benefit of a collateral legal entitlement that would and should have allowed him to avoid trial "has not led the Court to conclude that such [a] defendant[ ] can pursue [an] interlocutory appeal[ ]." *Id.* The relevant question for purposes of *Cohen*'s second and third prongs then, can't be whether the district court's decision denies the defendant a "right not to stand trial." *See also Digital,*

511 U.S. at 873 ("Section 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye."). While a post-judgment appeal may afford the defendant only an "imperfect[ ]" remedy to an improperly denied motion to dismiss, *some* meaningful review is available after trial – after all, an appellate court can still undo an unlawful conviction. *Mohawk*, 130 S. Ct. at 605. And this, the Court has said, is generally all that's required or permitted by § 1291. *Id.*

As it happens, the *only* time a criminal defendant's claimed "right not to be tried" will justify interlocutory appellate review is when a "statutory or constitutional [provision] guarantee[s] that trial will not occur – as in the Double Jeopardy Clause ('nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb'), . . . or the Speech or Debate Clause ('[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place')." *Midland Asphalt*, 489 U.S. at 801; *see also infra* n.4 (noting examples of statutes guaranteeing interlocutory review). Only then – only when a statutory or constitutional provision *itself* contains a *guarantee* that a trial will not occur – may courts of appeals intervene prior to a final judgment to review the defendant's claimed "right not to be tried." *Id.*; *see also United States v. Quaintance*, 523 F.3d 1144, 1146 (10th Cir. 2008) ("A right not to be tried rests upon an explicit statutory or constitutional guarantee that trial will not occur.") (internal quotation omitted); *United*

States v. Ambort, 193 F.3d 1169, 1171 (10th Cir. 1999) (same).[2] And, of course, most statutory and constitutional provisions – including the Sixth and Fourth Amendments – contain no such guarantee against trial even while they surely protect other important interests.

What's the reason for this rule? The Court has offered at least two rationales. First, statutory and constitutional guarantees against trial are, the Court has said, simply more important than others. "The third *Cohen* question, whether a right is 'adequately vindicable' or 'effectively reviewable,' . . . cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement," a judgment we are called on to make in the second aspect of *Cohen*'s test. *Digital*, 511 U.S. at 878-79. And when it comes to making that judgment, the Court has held "there are surely sound reasons for [privileging] . . . rights . . . originating in the Constitution or statutes. When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Id.* at 879. *See also Mohawk*, 130 S. Ct. at 605. Second and relatedly, the Court has explained that the final decision rule is

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[2] How explicit the right not to be tried must be in the statutory or constitutional text is a matter of some ongoing discussion by members of the High Court. *Compare Midland Asphalt*, 489 U.S. at 801 *with Digital*, 511 U.S. at 875.

a creation of Congress, and as such something Congress can modify. So where a statutory (or, of course, a constitutional) entitlement includes a right not to be tried – a right that by its terms contemplates vindication prior to trial – we must find some way to reconcile that direction with § 1291's direction favoring appeals only after final decisions. In this way, the Court has reasoned, "[w]here statutory and constitutional rights [not to be tried] are concerned . . . the collateral order doctrine might . . . be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law." *Digital*, 511 U.S. at 879.

B

Having explained that a criminal defendant's claimed right not to be tried must rest upon a statutory or constitutional guarantee in order to permit an interlocutory appeal, we now turn to the defendants' appeal to see how it measures up. We assess each of the defendants' three proffered arguments independently, as we must.

1

The defendants start by arguing that the government breached its plea agreement with McSha. The agreement promised that they, the individual corporate officers, would not have to face trial. The

defendants say they relied on the government's promise, and the government is now improperly disavowing its end of the bargain. Neither can we wait until after trial to take up this matter, the defendants argue. They say the plea agreement expressly gave them a right to avoid trial altogether and the agreement itself, along with due process, requires us to enforce the agreement's terms now.

How an executory plea agreement between a company and the government might serve as the font of *any* legal entitlements, let alone to the company's principals, the defendants do not explain.[3] But for purposes of assessing our jurisdiction we assume (without granting) it does. Even doing so – even assuming the plea agreement entitles the defendants to avoid any prosecution or trial – we hold that the district court's order denying their motion to dismiss still cannot be appealed on an interlocutory basis because it implicates neither a *statutory* nor a *constitutional* guarantee against trial.

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[3] None of the defendants was a party to the deal and the deal was *rejected* by the district court, thus depriving it of any binding effect. *See, e.g., Williams v. Jones*, 571 F.3d 1086, 1094 (10th Cir. 2009) (until district court accepts it, a plea agreement is "executory in nature"); *Mabry v. Johnson*, 467 U.S. 504, 507 (1984) ("A plea bargain . . . is a mere executory agreement" until "embodied in the judgment of a court"), *abrogated on other grounds by Puckett v. United States*, 129 S. Ct. 1423, 1430 n.1 (2009); *United States v. Norris*, 486 F.3d 1045, 1051 (8th Cir. 2007) (en banc) ("Rule 11 serves notice [that a plea agreement is] merely executory until the district court accepts the defendant's" guilty plea).

Our holding on this score was presaged long ago. Years before *Midland Asphalt* and *Digital Equipment*, in *United States v. Eggert*, 624 F.2d 973, 975 (10th Cir. 1980) (per curiam), we rejected a challenge very much like this one. The defendant there reached a plea agreement with a United States Attorney's Office in California that allegedly promised no new indictments against him. *Id.* at 974. Later, an Oklahoma federal prosecutor indicted the defendant, and the defendant argued that his California plea agreement precluded the Oklahoma prosecution. *Id.* The district court rejected this argument and, exactly as here, the defendant there sought to appeal. We declined to hear the appeal, explaining that the issue whether an indictment is barred by a plea agreement can be adequately "reviewed [and redressed] by th[e] court on direct appeal in the event of a conviction." *Id.* at 975. The defendants before us offer no way in which we might faithfully reach a different result in their case.

Instead, they ask us to follow *United States v. Alessi*, 536 F.2d 978, 980 (2d Cir. 1976), which allowed an interlocutory appeal seeking to enforce a prior plea agreement. Problematically, however, the defendants don't acknowledge that this court considered *Alessi* in *Eggert* and declined to follow it. *See Eggert*, 624 F.2d at 975. Even more problematically, the defendants do not acknowledge that *Alessi* was overruled by the Second Circuit over a decade ago in *United States v. Macchia*, 41 F.3d 35, 38-39 (2d Cir. 1994). Or that the Second Circuit held in *Macchia*,

exactly as we hold today, that under *Midland Asphalt* a criminal defendant can pursue an interlocutory appeal "only where the constitutional or statutory protection relied upon confers a right not to be tried." *Id.* at 39.

Allowing the defendants' appeal in this case would not only run afoul of the Supreme Court's rule requiring a statutory or constitutional guarantee against trial, it would also thwart the rationales the Court has offered for that rule. It is surely an important thing to recognize congressional or constitutional provisions that grant an immediate right of review, and to seek to reconcile those commands with the congressional command found in § 1291, as *Digital Equipment* noted. *See supra* Section II.A. But these imperatives are not at play when it comes to plea agreements. Plea agreements, after all, are no more than creatures of courts and litigants, executory private agreements without force of law until embodied in a court's judgment. Neither does the right at stake in a plea agreement any more rise to the level of importance necessary to outweigh "the societal interests advanced by the ordinary operation of final judgment principles" than do Fourth or Sixth Amendment violations, which have long been held unamenable to interlocutory appellate review. *Digital*, 511 U.S. at 879. It would, as well, be a very odd thing if one district court's approval of a plea agreement could pretermit proceedings and compel immediate appellate review in a second district court proceeding when the second district court interprets

that plea agreement as permitting a trial to go forward. Such a result would do nothing to advance and much to undermine § 1291's policy of protecting the prerogative of district court judges to manage the litigation process up to and through final judgment.

Even if current law bars their way, the defendants suggest we should use their case to extend it to permit their appeal. This, however, we may not do. Soon after *Midland Asphalt* announced the rule requiring a "statutory-or-constitutional guarantee" to secure an interlocutory appeal in cases like this one, Congress entered the arena by amending the Rules Enabling Act to allow the Supreme Court to prescribe rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291." 28 U.S.C. § 2072(c). In 2009, the Supreme Court in *Mohawk* held that this provision "warrant[s] the Judiciary's full respect," and has "important virtues" because the rule-making process "draws on the collective experience of bench and bar" and "facilitates the adoption of measured, practical solutions." 130 S. Ct. at 609 (internal quotation marks omitted). For these reasons, the Court held that "[a]ny further avenue for immediate appeal" of interlocutory rulings "should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides," not through further case-by-case expansion of the *Cohen* doctrine. *Id.*[4] Out of deference to the rubric Congress has

[4] Congress has not only provided a mechanism for *defining* when an appeal is final, it has also demonstrated that it is fully

(Continued on following page)

created, then, any request for expansion of the *Cohen* doctrine should be directed to the rules committee, not this court.

2

Separately, the defendants seek to appeal their separation of powers claim, contending that the district court improperly usurped the Executive's prosecutorial function by effectively instructing the government to launch indictments against them (the defendants). Again, however, whatever the merits (or demerits) of such an argument, it is not amenable to our jurisdiction at this time. And that's because, while the separation of powers inheres in the Constitution's structure and is surely an essential feature of our constitutional order, the constitutional document doesn't include a guarantee protecting those invoking separation of powers doctrine from trial. The defendants' argument, thus, is more like a Sixth Amendment speedy trial or Fourth Amendment suppression

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capable of creating *exceptions* to the final decision rule when appropriate. *See, e.g.*, 28 U.S.C. § 1292 (listing immediately appealable "[i]nterlocutory decisions"); Fed. R. Civ. P. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); Fed. R. Civ. P. 54(b) (providing for "entry of a final judgment as to one or more, but fewer than all, claims or parties"). Indeed, Congress has been and remains free to add an exception for rights guaranteed by a plea agreement, as it has for the privately conferred right to arbitration. *See Digital*, 511 U.S. at 879 & n.7.

argument than it is a Double Jeopardy argument – it is an argument arising from the Constitution but one that may be brought to this court on appeal only after trial, not before.

The defendants seek to avoid this result by referring us to *United States v. Bolden,* 353 F.3d 870 (10th Cir. 2003). In *Bolden,* the government sought an interlocutory appeal to challenge a district court's decision disqualifying an entire United States Attorney's office. *Id.* at 873-74. The government did so arguing that the district court had intruded on the Executive's prosecutorial function and that no remedy would exist after final judgment to correct that intrusion – in the event of a judgment in its favor, the government, as the prevailing party, normally can't appeal; in the event of a loss, double jeopardy generally precludes it from winning a new trial. *Id.* at 877. Only because "no post-trial relief exist[ed] that could remedy the alleged separation of powers injury" did the government seek and we permit the appeal. *Id.* at 878. By its terms, *Bolden* thus speaks only to the government's right to pursue an interlocutory appeal and does nothing to alter the rule requiring criminal defendants to identify a statutory or constitutional guarantee barring their trial. Neither does *Bolden*'s rationale apply here: unlike the government, which may be left without any appellate review after trial to remedy a violation of the separation of powers, a defendant's separation of powers argument *can* be

pursued and vindicated on appeal after final judgment in the event of a conviction.[5]

3

Finally, the defendants argue they should be allowed an immediate appeal because the government's decision to indict them "was clearly motivated, at least in part, by a desire to dispose of the [defendants'] First Amendment right of access to the courts, or to retaliate against them for joining the appeal" that the company eventually abandoned. Opening Br. at 34. In support of this argument, the defendants seek to analogize their case to *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992).

This tack fails as well. We have repeatedly rejected challenges much like this one, explaining that "[n]owhere in the Constitution or laws of the United States is there an 'explicit statutory or constitutional guarantee' of a right not to be tried for ordinary

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[5] This is not to say that a defendant can *never* appeal a separation of powers claim before completion of the underlying action. In *Morrison v. Olson*, for example, the Supreme Court reviewed separation of powers issues raised by parties who had been held in contempt for failure to comply with a subpoena. 487 U.S. 654 (1988). This is because, as the Court has explained, an "order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action." *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 76 (1988). And, of course, mandamus procedures supply another possible avenue for relief, though one the defendants in this case have not sought to pursue.

speech, even if otherwise protected by the First Amendment." *Ambort*, 193 F.3d at 1171; *see also Quaintance*, 523 F.3d at 1146. Instead, we have held, "First Amendment defenses like those asserted here are adequately safeguarded by review after any adverse final judgment." *Ambort*, 193 F.3d at 1172. Thus to the extent the defendants wish to argue that a First Amendment defense precludes their prosecution, we hold it is a matter that we may resolve after – but only after – a final judgment.

As to *PHE*, we have long recognized that it is "perhaps unique," permitting as it did an interlocutory appeal only in light of the following "confluence of factors": (1) the government had previously pursued multiple prosecutions against the defendant in question; (2) there was substantial evidence the prosecutions had been undertaken in bad faith; and (3) the apparent purpose *and* effect of the multiple prosecutions were to act as a prior restraint on the defendant's protected First Amendment publishing activities. 965 F.2d at 854-55; *see also Ambort*, 193 F.3d at 1172; *Quaintance*, 523 F.3d at 1147. All of these conditions were – and, we hold again today by way of confirmation, are – essential predicates to the review granted in *PHE*. None, however, is present in this case.

III

That would seem to mark the end of the road for the defendants' appellate effort. None of the

arguments they pursued in their motion to dismiss is amenable to interlocutory review. But before us the defendants seek to raise one more argument – one they didn't press in their motion to dismiss before the district court. Now, they ask us to hold that *double jeopardy* bars their upcoming trial. And, they observe, the Constitution's Double Jeopardy clause *does* include an express guarantee against trial. *See* U.S. Const. amend. V; *Midland Asphalt*, 489 U.S. at 801; *Abney*, 431 U.S. at 661-62. Accordingly, unlike all their other arguments, this one is at least a *possible* candidate for interlocutory review.

But it isn't in *this* case. The defendants didn't pursue a double jeopardy argument before the district court and so it is either waived or at least forfeited. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010).[6] And even if we were inclined to overlook this

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[6] The closest the defendants came to raising this issue was in a footnote in their motion to dismiss the indictment where they stated: "Collateral estoppel is a component of the concept of double jeopardy. It 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *accord United States v. Console*, 13 F.3d 641, 664 (3d Cir. 1993) ('The double jeopardy clause protects against relitigation of an issue necessarily determined in the defendant's favor by a valid and final judgment.')." Aplt. App. at 67. Plainly, this footnote, appearing in the section of the defendants' brief titled "The Indictment Violates the Terms of the Original Plea Agreement" did not clearly raise the issue they now seek to pursue – that double jeopardy bars the present indictment. No doubt that's why the district court's opinion didn't address it.

problem, another insurmountable barrier would still block the defendants' way. The Supreme Court has told us that a claim of double jeopardy must be at least "colorable" to confer interlocutory jurisdiction on an appellate court. *Richardson v. United States*, 468 U.S. 317, 322 & n.6 (1984); *see also United States v. McAleer*, 138 F.3d 852, 857 (10th Cir. 1998). And the defendants' double jeopardy claim isn't this, and isn't for at least two reasons.

First, to invoke the Constitution's protection against *double* jeopardy, naturally one must have been subjected to jeopardy for a *first* time. It is a "fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. 377, 393 (1975). As the defendants concede, however, the prior criminal proceeding resulting in the failed plea agreement involved charges brought *only* against the company, not them. The individual defendants before us were *themselves* never placed in jeopardy in the first proceeding. Neither can they bootstrap onto any jeopardy the company may have faced. The protections the double jeopardy clause affords are "intrinsically personal," *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 779 (1994) (internal quotation omitted), and just because the corporation faced criminal jeopardy hardly means that its officers, directors or shareholders also automatically faced jeopardy, too, *see United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 586 (6th Cir. 1991) (rejecting claim that punishment of corporation constituted punishment of

employees paid on the basis of the corporation's profits); *United States v. Woods*, 949 F.2d 175, 177 (5th Cir. 1991) (per curiam) (action against corporation does not constitute punishment of its sole shareholder); *cf. United States v. Baird*, 63 F.3d 1213, 1219 (3d Cir. 1995) ("[J]eopardy does not, and cannot, attach until one is made a *party* to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence, and that, until such time, the constitutional double jeopardy prohibition can have no application"). Undoubtedly, the defendants before us well know all this: after all, they negotiated the initial plea agreement specifically to *avoid* being personally prosecuted.[7]

Second, even if the defendants somehow could stand in McSha's shoes for purposes of double jeopardy analysis, this still wouldn't help their cause. Jeopardy attaches in a jury trial "when the jury is empaneled and sworn," *Crist v. Bretz*, 437 U.S. 28, 36 (1978), and in a bench trial "when the court begins to hear evidence," *Serfass*, 420 U.S. at 388. In the plea context at issue in this case, jeopardy does not attach at least until the guilty plea is accepted, and perhaps not until even later. *See United States v. Combs*, 634

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[7] Were McSha just a shell company, and the earlier prosecution actually directed at the individual defendants now before us, as alter egos of the company, that *might* be another story. *See United States v. 51 Pieces of Real Property, Roswell*, No. 97-1440, 1998 WL 440439, at *3 & n.4 (10th Cir. July 17, 1998) (unpublished). But we need and do not decide that question as none of the defendants before us makes such a claim.

F.2d 1295 (10th Cir. 1980) (discussing plea acceptance or sentencing); *United States v. Thompson*, 814 F.2d 1472, 1478 n.6 (10th Cir. 1987).[8] Here, of course, the district court never accepted the company's plea. Jeopardy thus never attached to McSha, so not even McSha (let alone the defendants) could now assert a colorable claim of double jeopardy. Thus it is that the individual defendants have no colorable claim of double jeopardy that might possibly warrant this court's intervention prior to trial.

* * *

Because we are without appellate jurisdiction, this matter is

Dismissed.

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[8] Even after the guilty plea is accepted, it may sometimes be withdrawn or a conviction under it challenged on appeal – circumstances that will not create a double jeopardy impediment to a subsequent prosecution. *See, e.g., Combs*, 634 F.2d at 1300 n.1 (McKay, J., concurring in part and dissenting in part); *United States v. Podde*, 105 F.3d 813, 818 (2d Cir. 1997); *Taylor v. Kincheloe*, 920 F.2d 599, 605-06 (9th Cir. 1990); *United States v. Baggett*, 901 F.2d 1546, 1549-50 (11th Cir. 1990); *Fransaw v. Lynaugh*, 810 F.2d 518, 524-25 (5th Cir. 1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	Case Number CR-09-168-C
LARRY C. SHAVER, LEWIS PATRICK COLBERT, and HOWARD MICHAEL WAMPLER,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Oct. 15, 2009)

Defendants are charged pursuant to an Indictment alleging fourteen separate counts of conspiracy to commit wire fraud, money laundering, wire fraud, and making a false statement to a financial institution. Defendants subsequently filed the present Motion to Enforce Plea Agreement and Quash Indictment.[1]

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[1] Defendants request an evidentiary hearing because they contend that it is necessary to fully explore the facts leading to the Indictment in this case. The Court finds that a determination of the disputed facts is not necessary to its resolution of the present motion, and therefore declines to set this case for a hearing.

Background

Defendant Shaver founded McSha Properties (McSha), owning one-third of its stock and functioning as the corporation's CEO. Steven Jones and Michael McClure owned the remaining two-thirds, although Defendant Shaver held irrevocable voting proxies for their shares, giving him in effect a controlling interest in the company. Defendant Wampler was an officer and director of the corporation, and Defendant Colbert appears to have provided accounting services to the corporation, although his precise role is unclear.

In late 2006, McSha became the focus of a federal investigation into the company's use of federal low income housing tax credits. Following a long period of negotiation, during which all parties were aware that criminal charges were contemplated against all five individuals, an agreement was reached whereby McSha would plead guilty to wire fraud and money laundering in exchange for the government's promise not to bring individual indictments against Mr. Shaver, Mr. Wampler, Mr. Colbert, Mr. Jones, and Mr. McClure. McSha would also pay a large fine and the plea agreement provided that all five individuals would sign guarantees covering the amount due prior to entry of the corporation's guilty plea.

An earlier version of the plea agreement required Defendant Colbert to forfeit his CPA license. This provision was deleted, however, once Defendant Colbert provided proof that he placed his license into

retirement status prior to entry of the plea. According to Defendant Colbert, he did this so that the mandatory provision in the plea agreement would be removed, thereby enabling him to retain his life insurance policy issued through the Oklahoma Accountancy Board.

In addition, prior to the corporation's guilty plea, its attorney, Mr. McCampbell, advised the five individuals and their attorneys that they needed to enter into a Cross-Pledge Agreement, setting out each individual's specific obligations. Mr. McCampbell further advised that in order for the plea agreement to "work," no single individual could have control of the voting stock of McSha. Accordingly, Defendant Shaver relinquished his irrevocable voting proxies and resigned as the corporation's CEO prior to entry of the plea. Defendant Wampler also resigned as an officer and director of the corporation.

During the plea hearing, Judge Heaton expressed concern that the plea agreement granted immunity to those actually responsible for the wrongdoing. Ultimately, the court rejected the plea agreement. McSha filed a motion for reconsideration, which was denied. The corporation then appealed to the Tenth Circuit. During the pendency of this appeal, the government negotiated an agreement with Mr. Jones and Mr. McClure, granting them immunity from prosecution if they would cause the corporation to dismiss its appeal. Because Defendant Shaver had relinquished his voting proxies, Mr. Jones and Mr. McClure were in a position to jointly determine the corporation's

actions, and they ultimately caused the appeal to be dismissed. Subsequently, the government secured the present Indictment against Defendants Shaver, Wampler, and Colbert.

ANALYSIS

Defendants offer three separate arguments for why the Indictment should be dismissed. First, they contend that they detrimentally relied upon the plea agreement offered to the court in *United States v. McSha Properties, Inc.*, Case No. CR-08-40-HE (W.D. Okla.). Second, Defendants argue that the court's rejection of the plea agreement violates the principles of separation of powers. Finally, Defendants contend that the Indictment violates their due process rights because the prosecutor's motives in seeking charges were unlawful.

A. Detrimental Reliance on Plea Agreement

"'The law governing the interpretation of plea agreements is an amalgam of constitutional, supervisory, and private contract law concerns.'" *United States v. Novosel*, 481 F.3d 1288, 1291 (10th Cir. 2007) (*quoting United States v. Wood*, 378 F.3d 342, 348 (4th Cir. 2004)). While contract principles are useful in the interpretation and enforcement of plea agreements, it is widely recognized that "[a] plea agreement . . . is not simply a contract between two parties. It necessarily implicates the integrity of the criminal justice system and requires the courts to exercise judicial

authority in considering the plea agreement and in accepting or rejecting the plea." *Id.* at 1292.

According to the Supreme Court, a defendant's mere acceptance of a proposed plea bargain is insufficient to create a constitutional right to have that agreement enforced. *See Mabry v. Johnson*, 467 U.S. 504, 510-11 (1984), *abrogated on other grounds by Puckett v. United States*, ___ U.S. ___, 129 S.Ct. 1423 (2009). The Court reasoned that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* at 507.

A number of circuits recognize that a plea agreement is not binding upon the government or the defendant until it is accepted by the court. *See United States v. Norris*, 486 F.3d 1045, 1049 (8th Cir. 2007),cert. denied ___ U.S. ___, 128 S.Ct. 881 (2008); *Novosel*, 481 F.3d at 1292-94; *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992). However, a defendant who reasonably relies upon the promises contained within a plea agreement to his or her detriment may be entitled to specific performance of the agreement. *Novosel*, 481 F.3d at 1293; *Savage*, 978 F.2d at 1138. According to the Fifth Circuit, neither party to a plea agreement "is justified in relying substantially on the bargain until the trial court approves it." *United States v. Molina-Iguado*, 894 F.2d 1452, 1456 (5th Cir. 1990) (*quoting United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980)).

The Eighth Circuit does not recognize detrimental reliance in the context of plea agreements unless either the court formally accepts the defendant's plea or the plea agreement expressly requires some sort of pre-plea performance. *Norris*, 486 F.3d at 1049. In considering whether an agreement requires pre-plea performance, the Court further noted that

> if a plea agreement contemplates the defendant's cooperation generally, without specifically requiring that the cooperation is to occur before the district court accepts the defendant's guilty plea, then the defendant cannot obtain specific performance of the plea agreement (absent the district court's acceptance of a guilty plea) unless the defendant shows that the Government has gained an unfair advantage over the defendant.

Id. at 1049 n.5.

Defendants contend that they are entitled to specific performance of the plea agreement because they relied upon its provisions to their detriment in a number of ways. First, Defendant Shaver gave up control of the company that he created when he resigned as its CEO and forfeited the irrevocable voting proxies that he held. Second, Defendant Colbert relinquished his CPA license and can no longer work as a CPA in Oklahoma. Third, Defendant Wampler resigned from his position as an officer and director of McSha. Finally, Defendants contend that they suffered further detriment when the corporation's appeal was dismissed, which could not have happened had Defendant

Shaver not relinquished his voting proxies. Additionally, Defendants argue that the corporation's plea was in fact accepted by the court, thereby requiring the government to abide by the terms of the plea agreement.

The Court finds Defendant's arguments unavailing. First, a careful examination of the transcript from the plea hearing, as well as the court's order denying reconsideration of its rejection of the plea agreement, indicate that the corporation's plea was never formally accepted. At the end of the hearing, Judge Heaton stated: "I simply conclude that the agreement that's offered here is not in the best interest of justice, so I'm going to decline to accept the plea." (Mot., Dkt. No. 34, Ex. 3, Tr. at 47:18-47:20.) In its order denying Defendants' motion for reconsideration, the court indicated that, during the plea hearing, it had assumed that if it did not accept the plea agreement, then the corporation "would not pursue the plea which had not, at that point, been accepted by the court." (*United States v. McSha Properties, Inc.*, Case No. CR-08-4-HE, Dkt. No. 13 at 4 n.7.) Because the court had not formally given the corporation the chance to withdraw its guilty plea on the record,[2] the court's order denying reconsideration

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[2] Fed. R. Crim. P. 11(c)(5) requires that, if the court rejects a plea agreement of the type at issue here, then the court must, in open court and on the record:

> (A) inform the parties that the court rejects the plea agreement; (B) advise the defendant personally that

(Continued on following page)

stated: "As the court's rejection of the plea agreement does not necessarily require rejection of defendant's plea, defendant is directed to advise the court within ten days of entry of this order as to whether defendant wishes to proceed with its plea or withdraw it." (*Id.* at 9.) Nothing in the above language leads the Court to conclude that the corporation's plea was ever formally accepted by the district court, and therefore specific performance is not warranted on this basis.

In addition, the plea agreement did not contemplate the pre-plea performance of the actions of which Defendants complain.[3] Nowhere in the plea agreement does it even state that Defendant Shaver was required to resign as the CEO of McSha and forfeit his irrevocable voting proxies, let alone that such actions were to be performed prior to McSha's plea. Likewise, the agreement does not mention that Defendant Wampler was required to resign from his

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> the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and (C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

[3] Defendants state that the plea agreement required them to execute guarantees for the fine and restitution imposed upon McSha. This is the only action that the plea agreement required Defendants to take prior to McSha's plea. However, Defendants cannot demonstrate that they suffered any detriment as a result of their pre-plea performance because no fines or restitution amounts were ever imposed on McSha since the charges against it were ultimately dismissed.

position as an officer and director of McSha. While both parties agree that a prior version of the plea agreement specifically required Defendant Colbert to forfeit his CPA license, there is no indication that this needed to be done before McSha entered its guilty plea. Instead, Defendant Colbert states that he relinquished his license before the plea so that the mandatory provision in the plea agreement would be removed, thereby enabling him to retain his life insurance policy issued through the Oklahoma Accountancy Board. Defendants' motion clearly states that they were told by Mr. McCampbell, McSha's attorney, that these actions should be accomplished before the plea hearing and that they were necessary to make the settlement work.

Unless Defendants can demonstrate that the government obtained some sort of unfair advantage over them as a result of their actions prior to McSha's plea, then they are not entitled to specific performance of the plea agreement. Although the government was able to obtain the dismissal of McSha's appeal of Judge Heaton's rejection of the plea agreement, the Court doubts whether that is the sort of unfair advantage contemplated here. The types of cases generally cited for this proposition involve defendants who cooperated with the government prior to their plea, providing information or statements that would give the government the advantage in the defendants' subsequent trial. *See United States v. Wessels*, 12 F.3d 746, 753 (8th Cir. 1993). Here, the government did not gain any unfair advantage over

Defendants in their subsequent trial as a result of McSha's dismissal of its appeal because the appeal did not in any way preclude the government from bringing the current charges against Defendants. Accordingly, the Court finds that Defendants are not entitled to specific performance of the plea agreement on this basis.

B. Separation of Powers

Next, Defendants argue that Judge Heaton's rejection of the plea agreement constitutes a violation of the doctrine of separation of powers. According to Defendants, the court's actions impermissibly intruded upon the prosecutor's role of deciding who should be charged with what crimes.

Rule 11 of the Federal Rules of Criminal Procedure permits a district court to either accept or reject a plea agreement. Fed. R. Crim. P. 11(c)(3). According to the Tenth Circuit, "so long as district courts exercise sound judicial discretion in rejecting a tendered plea, Rule 11 is not violated." *United States v. Robertson*, 45 F.3d 1423, 1437 (10th Cir. 1995). While courts have broad discretion to reject sentence bargains, where the prosecutor agrees to recommend or not to oppose a particular sentence, their discretion is somewhat limited in the context of charge bargains, which are based on the agreement to dismiss or not to bring other charges. *Id.* Accordingly, "concerns relating to the doctrine of separation of powers counsel

hesitancy before second-guessing prosecutorial choices" in the context of charge bargains. *Id.* at 1438.

While courts must be hesitant about rejecting charge bargains, Rule 11 specifically gives courts the authority to do so. *See* Fed. R. Crim. P. 11(c)(3)(A). Further, the Rule does not specify what criteria courts should consider in determining whether to accept or reject a plea agreement. Here, Judge Heaton was hesitant to reject the proffered agreement, but he found that it was not in the best interests of justice. (*See* Tr. at 46:7-46:14.) Although stating that he felt that the most culpable individuals were not being prosecuted, Judge Heaton in no way required the dismissal of the charges against McSha or required that any charges be filed against Defendants. While the court would not accept the proffered plea agreement, the Judge's order denying reconsideration clearly indicated that McSha would still be permitted to plead guilty should it desire to do so. All of the charging decisions in this case were left to the discretion of the prosecutor, who could very well have declined to prosecuted Defendants if he so desired. The Court finds, therefore, that the doctrine of separation of powers does not mandate that the pending Indictment be dismissed.

C. Due Process

Initially, Defendants contend that their due process rights were violated by the dismissal of McSha's appeal. According to Defendants, the government

entered into negotiations with counsel for Mr. Jones and Mr. McClure during the pendency of McSha's appeal, offering them immunity from prosecution if they would agree to cause McSha to dismiss its appeal. Because Mr. Shaver had relinquished his voting proxies in anticipation of McSha's plea, Mr. Jones and Mr. McClure controlled two-thirds of the voting shares and were able to cause the corporation to dismiss its appeal.

The Court finds that the government's actions did not deprive Defendants of their due process rights. Although the dismissal was induced by the government's promise not to prosecute Mr. Jones and Mr. McClure, the government in no way prohibited the exercise of McSha's right to appeal. Mr. Jones and Mr. McClure were responsible for the appeal being dismissed and, while the government may have encouraged them to do so, the Court cannot conclude that this constitutes a governmental deprivation of constitutional rights.

Next, Defendants claim the present prosecution violates their right to due process because it is motivated by a desire to interfere with Defendants' right to access to the courts or in retaliation for causing McSha to appeal the rejection of its plea. "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (*quoting Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). In order for a claim of vindictive

prosecution to lie, Defendants "must establish either (1) actual vindictiveness, or (2) a realistic likelihood of vindictiveness which will give rise to a presumption of vindictiveness." *United States v. P.H.E., Inc.*, 965 F.2d 848, 860 (10th Cir. 1992) (*quoting United States v. Raymer*, 941 F.2d 1031, 1040 (10th Cir. 1991)). According to the Tenth Circuit, district courts should "look at the totality of the objective circumstances to decide whether a realistic possibility of vindictive prosecution exists." *Raymer*, 941 F.2d at 1040.

> "There is no vindictiveness as long as the prosecutor's decision is based upon the normal factors ordinarily considered in determining what course to pursue, rather than upon genuine animus against the defendant for an improper reason or in retaliation for exercise of legal or constitutional rights." . . . Our inquiry must be whether, "as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right."

Id. at 1042 (citations omitted).

Defendants contend that the prosecutor's decision to charge them was "motivated, at least in part, by a desire to dispose of the Defendants' First Amendment right to access to the courts, or to retaliate against them for bringing the appeal." (*See* Mot., Dkt. No. 34,

at 25.) The Court finds, however, that there is not a reasonable likelihood that the prosecution would not have occurred absent a desire to punish Defendants for causing McSha to appeal the rejection of its plea. Once the plea agreement was rejected and McSha withdrew its guilty plea, the prosecution found itself in the position of either pursuing further charges against McSha or charging the individual Defendants. Because the original prosecution of McSha was based upon the expectation that it would plead guilty based upon an Information only, and because the prosecution was on notice that a similar plea agreement would not be acceptable to the Court, it is unlikely that the government would choose once again to pursue charges solely against the corporation. Instead, it is much more likely that the government would choose to bring charges against Defendants, charges that all the parties knew the government was contemplating all along. The government clearly indicates as much in its response to McSha's motion for reconsideration of the rejection of its plea agreement. (*See United States v. McSha Properties, Inc.*, Case No. CR-08-4-HE, Dkt. No. 12 at 2.) Therefore, the Court finds that Defendants have not met their burden of showing actual prosecutorial vindictiveness or a reasonable likelihood of vindictiveness.

Conclusion

Accordingly, Defendants' Joint Motion to Enforce Plea Agreement and Dismiss Indictment (Dkt. No. 34) is DENIED.

IT IS SO ORDERED this 15th day of October, 2009.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOWARD MICHAEL WAMPLER, et al., Defendants-Appellants.	Nos. 09-6229, 09-6230 and 09-6231

ORDER

(Filed Dec. 23, 2010)

Before **GORSUCH**, and **EBEL**, Circuit Judges, and **ARGUELLO**,* District Judge.

Appellants Howard Michael Wampler, Larry C. Shaver, and Lewis Patrick Colbert's consolidated petition for rehearing is denied.

* The Honorable Christine M. Arguello, United States District Court Judge, District of Colorado, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk